No. 85-6756

April 18, 1986

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

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JAMES ERNEST HITCHCOCK,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

==========

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Eighth Amendment as construed in Lockett v. Ohio forbids the execution of a death sentence obtained at a pre-Lockett Florida trial in which defense counsel failed to prepare, present and argue available nonstatutory mitigating evidence because a controlling decision of the State's highest court had explicitly held that only statutorily enumerated mitigating factors could be considered in the capital sentencing process?

II. Whether the Court of Appeals below erred in holding:

A. that in order to prevail on this sort of Lockett claim, a federal habeas petitioner is required to demonstrate that his attorney would have presented a different kind of evidence in mitigation, rather than simply that the attorney would have made a fuller, more focused, and more forceful presentation of mitigation, if the unconstitutional rule of state law had not been in effect;

B. that in deciding whether the attorney would have presented additional evidence and argument in mitigation, a plausible and well-pleaded allegation that significant mitigating evidence and argument were not presented because of the State's unconstitutional rule of law may be rejected without an evidentiary hearing in any court, consistently with the federal habeas procedures prescribed by Blackledge v. Allison; and

C. that a novel procedural rule denying a habeas petitioner an evidentiary hearing on this issue where his supporting affidavit from his trial attorney fails explicitly to state that the attorney would have presented additional evidence and argument in mitigation may properly be applied to an affidavit drafted before the announcement of the rule, without permitting the petitioner an opportunity to present supplemental affidavits?

III. Whether the imposition of a death sentence by the court after it had offered the defendant a life sentence prior to trial, without an affirmative record showing to justify the "qualitatively" enhanced penalty imposed after the defendant had exercised his fundamental right to trial by jury, violates the Due Process Clause and Eighth Amendment guarantees of fairness and reliability?

IV. Whether Mr. Hitchcock should be provided the opportunity to prove at an evidentiary hearing his claim that the death penalty is being arbitrarily applied in Florida on the basis of race and other impermissible factors in violation of the Eighth and Fourteenth Amendments especially in view of the new standards for evaluating such claims announced by the Court of Appeals?

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No. _____

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OCTOBER TERM 1985

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JAMES ERNEST HITCHCOCK,

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Petitioner, JAMES ERNEST HITCHCOCK, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed August 28, 1985, and states:

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 770 F.2d 1514 (11th Cir. 1985) (en banc), and is set out at pages 1a-13a of the Appendix.[1] The opinion denying rehearing is reported at 777 F.2d 628 (11th Cir. 1985) and is set out at App. 14a-16a. The panel opinion of the court of appeals is reported at 745 F.2d 1332 (11th Cir. 1985) and is set out at App. 17a-33a. The Order of the United States District Court, Middle District of Florida, dismissing the petition for writ of habeas corpus, and the Memorandum of Decision of that court are unreported, and are set out in the Appendix at pages 38a-39a and 40a-66a respectively.

[1] Citations to the Appendix accompanying this petition are designated App. ___.

JURISDICTION

The judgment and opinion of the Court of Appeals were filed on August 28, 1985, and petitioner's timely petition for rehearing was denied on November 19, 1985. Thereafter, Justice Powell entered an order extending the time within which to file the petition for writ of certiorari to and including April 18, 1986. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defence;

the Eighth Amendment which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

It also involves Section 921.141, Florida Statutes (1975) which is set out in the Appendix hereto at App. 34a. Also included in the Appendix is the amended statute, Section 921.141, Florida Statutes (1979). App. 36a.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Mr. Hitchcock was convicted of first degree murder, after trial by jury in January, 1977, in Orange County, Florida. A capital penalty trial was held in February and the jury returned a sentencing verdict of death. The judge sentenced Mr. Hitchcock to death a week later. Mr. Hitchcock's conviction and sentence were affirmed on direct appeal. Hitchcock v. State, 413 So.2d 741 (Fla.), cert. denied, 459 U.S. 960 (1982).

Thereafter, Mr. Hitchcock filed a motion for post-conviction relief in the state trial court pursuant to Fla.R.Crim.P. 3.850. He also filed pleadings requesting a stay of execution, and expenses for expert and lay witnesses. The trial court denied Mr. Hitchcock's motion for post-conviction relief without an evidentiary hearing and a week later the Florida Supreme Court affirmed that denial. Hitchcock v. State, 432 So.2d 42 (Fla. 1983).

In the United States District Court for the Middle District of Florida, Mr. Hitchcock had filed his petition for writ of habeas corpus,[2] together with an application for stay of execution and a motion for continuance pending the exhaustion of the state court proceedings. After the ruling by the Florida Supreme Court, the federal district court entered a stay of execution. Thereafter, the respondent filed a motion to dismiss pursuant to Rose v. Lundy, 455 U.S. 509 (1982) (pertaining to exhaustion of state remedies), and Mr. Hitchcock filed motions for leave to amend the habeas petition, for expenses of witnesses, for discovery, and for an evidentiary hearing. The motion for leave to amend the habeas petition was granted.

A motion hearing was then held on the remaining motions -- respondent's motion to dismiss, and Mr. Hitchcock's motions for expenses, discovery, and for an evidentiary hearing. The district court reserved ruling on all of the motions, except the motion for evidentiary hearing, which it indicated would be granted. However, on September 22, 1983, the district court entered an order summarily dismissing Mr. Hitchcock's petition for writ of habeas corpus pursuant to Rule 4, Rules Governing Section 2254 Cases in the United States District Courts.

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2 Jurisdiction of the federal court was invoked pursuant to 28 U.S.C. § 2241 and § 2254, the petitioner being held in the custody of the State of Florida, and petitioner alleging that such custody was in violation of the Constitution of the United States.

Mr. Hitchcock filed his notice of appeal and the district court issued a certificate of probable cause to appeal. A panel of the Eleventh Circuit Court of Appeals affirmed, by a two to one decision, the district court's summary dismissal of the habeas petition. Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir. 1984); App. 17a. Mr. Hitchcock's timely-filed suggestion for rehearing en banc was granted. 745 F.2d at 1348; App. 33a. The en banc court, by a seven to five margin, reinstated the panel's judgment. Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985); App. 1a. A timely petition for rehearing was denied with an opinion filed November 19, 1985. Hitchcock v. Wainwright, 777 F.2d 628 (11th Cir. 1985): App. 14a.

B. Statement of the Facts

The panel opinion of the court of appeals briefly summarized the facts concerning the offense:

> Thirteen-year-old Cynthia Driggers was murdered by strangulation on July 31, 1976. Her body was recovered later that same day. An autopsy revealed that Drigger's hymen had been recently lacerated and that sperm was present in her vagina. Her face had cuts and bruises in the vicinity of the eyes. On August 4, 1976, petitioner confessed to the murder. He claimed that he and the victim had consensual sexual relations and he killed her when she became upset afterward and threatened to tell her parents. At trial, petitioner changed his story. He testified his brother, Richard, the girl's stepfather, discovered Cynthia and him having intercourse and reacted by strangling the girl.

745 F.2d at 1334: App. 19a. The offense occurred in Richard's house where James Hitchcock was also living. In support of his defense, James attempted to present evidence concerning Richard's character for violence and his relationship with James in order to demonstrate that it was likely that Richard committed the offense and that James would have been motivated to accept the blame and to cover up for Richard.

At the sentencing trial the prosecution presented no additional testimony and the defense presented only one witness, James Harold Hitchcock, another brother of petitioner, who testified that petitioner had a habit of "sucking on gas" from

automobiles when he was five or six years old, which caused him to "pass out" once and that after that his "mind wandered." TAS 7-8.[3] He further testified that petitioner had come from a family with seven children, which earned its livelihood by picking cotton. TAS 8-9. Thereafter, the jury recommended and the judge imposed a death sentence. In support of the sentence, the judge entered findings of fact in which he found three aggravating circumstances[4] and one mitigating circumstance.[5]

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3 The following symbols will be used to refer to the record in the court below. "R" refers to the record on appeal filed in the court of appeals. The portions of the record of the state court proceedings contained as exhibits in the Record are referred to by the following designations: "T" denotes the transcript of the trial in state court; "TR" designates the record on direct appeal in the Florida Supreme Court; "TAS" refers to the transcript of the advisory sentencing proceedings; and "TS" denotes the transcript of the imposition of the sentence by the state judge.

4 "The murder of Cynthia Ann Driggers was committed while the defendant was engaged in the commission of an involuntary sexual battery.... [T]he defendant killed Cynthia Ann Driggers for one purpose only, to avoid being arrested after commission of the involuntary sexual battery.... The murder was especially heinous, wicked, or cruel." TR 196-197.

5 "At the time of the murder, defendant was 20 years of age. [This] [c]ircumstance ... is applicable." TR 197.

REASONS FOR GRANTING THE WRIT

I.

THE EIGHTH AMENDMENT AS CONSTRUED IN LOCKETT V. OHIO FORBIDS THE EXECUTION OF A DEATH SENTENCE OBTAINED AT A PRE-LOCKETT FLORIDA TRIAL IN WHICH DEFENSE COUNSEL FAILED TO PREPARE, PRESENT AND ARGUE AVAILABLE NONSTATUTORY MITIGATING EVIDENCE BECAUSE THE CONTROLLING PRECEDENT OF THE STATE'S HIGHEST COURT HAD EXPLICITLY HELD THAT ONLY STATUTORILY ENUMERATED MITIGATING FACTORS COULD BE CONSIDERED IN THE CAPITAL SENTENCING PROCESS

The issue at bar is of singular importance to the application of the Florida capital sentencing statute in the years prior to Lockett v. Ohio, 438 U.S. 586 (1978). Mr. Hitchcock's trial counsel -- reasonably, by all accounts -- relied upon the authoritative construction of the state's highest court that mitigating evidence was strictly limited to statutory factors and as a result forewent substantial investigation, presentation, and argument of significant nonstatutory mitigating evidence. As a consequence, the sentencing jury and judge were unable to consider significant nonstatutory mitigating evidence and were directed by counsel's advocacy to consider only statutory mitigating circumstances as a basis for a sentence less than death. The question is whether such a result violated the Eighth Amendment.

Although the en banc majority did not directly decide this issue, it did assume or acknowledge the general validity of the claim, and the issue has been squarely presented by the record and the contentions of the parties throughout the litigation. It merits certiorari for several reasons. First, it is a question common to a considerable number of Florida death cases of the same vintage as Mr. Hitchcock's case, and has been much litigated before both the Florida Supreme Court and the federal habeas corpus courts but not consistently or satisfactorily resolved by either. The Florida Supreme Court, for example, has ruled on a case-by-case basis either that Lockett was or was not a change in Florida law depending upon the particular circumstances of the case then before it, but in every case it has

denied relief.[6] Thus, the very failure of the en banc court of appeals below to settle this recurring issue perpetuates confusion about it that can now be laid to rest only by this Court.[7] Second, the substantive issue is a vital one, involving the imposition of death sentences under a rule of law that this Court has condemned as violating the most basic constitutional principle of capital sentencing. Third, as shown in Part II, infra, the grounds of decision below are interwoven with the basic constitutional question and are insufficient to avoid it.

It is no longer seriously disputed that Florida law prior to the 1978 decision in Lockett v. Ohio could reasonably be applied to restrict the consideration of mitigating factors to the statutory list.

In Cooper v. State, 336 So.2d 1133 (Fla. 1976) the Florida Supreme Court affirmed the preclusion of mitigating evidence (stable employment record) proffered by the defendant, on the ground that it was not included in the statutory list: "the Legislature chose to list the mitigating circumstances which it judged to be reliable ... and we are not free to expand that list." Id. at 1139. The court emphasized that the statutory language restricting consideration of mitigating factors to those "as enumerated" in the statute were "words of mandatory limitation." Id. at 1139 n.7. It explained that such a result was required by Furman v. Georgia, 408 U.S. 238 (1972): "This [mandatory limitation on mitigating factors] may appear to be narrowly harsh, but under Furman undisciplined discretion is

6 Compare Muhammad v. State, 426 So.2d 533 (Fla. 1983) (trial counsel could not be expected to predict the decision in Lockett with regard to the scope of permissible mitigating factors); Jackson v. State, 436 So.2d 4 (Fla. 1983) (same), with, Cooper v. State, 437 So.2d 1070, 1072 (Fla. 1983) ("Lockett did not change the law of Florida").

7 See also the following cases pending before the Court in which some aspect of the restrictive application of Florida law before Lockett is raised: Sireci v. Florida, No. 84-6895, pet. for cert. filed June 12, 1985; Wainwright v. Songer, No. 85-567, pet. for cert. filed September 30, 1985; Darden v. Wainwright, No. 85-5319, cert. granted, September 3, 1985.

abhorrent whether operating for or against the death penalty." Id. (emphasis in original). Moreover, the decision in Cooper was the authoritative pronouncement on state law as to this subject, for it was announced a few days after the Court's decision in Proffitt upholding the facial constitutionality of the Florida capital sentencing statute.[8]

This limiting application by Florida's highest court has been recognized by courts that have reviewed the status of the Florida law during the period before Lockett. The Eleventh

8 The plurality opinion in Proffitt v. Florida, 428 U.S. 242 (1976) has occasionally been cited as proof that Florida did not preclude consideration of nonstatutory mitigating factors. Such a reading of Proffitt is unwarranted. First, Cooper was announced after Proffitt so if Proffitt had actually so held, then Cooper would not have been decided to the contrary. Even so, the Proffitt opinion itself inserted in brackets the modifying word "statutory" in describing the Florida process for weighing mitigating circumstances. Id. at 250. The footnote to this passage of the plurality opinion is what some have tried to read as holding that the statute was open-ended since it noted that the word "limited" was included in the statute with regard to aggravating factors and not included regarding mitigating factors. Id. at 250 n.8. However, in this footnote the Court was actually focusing on the limitation on aggravating factors by contrasting it with the provision for mitigation. At best, the observations are conflicting, probably because the Court was only concerned with the facial validity of the statute. See id. at 254 n.11; Gregg v. Georgia, 428 U.S 153, 201 n.51 (1976). Also, it is at least of historical interest that this difference in language was the result of an undetected transcription error, not legislative intent. See Hertz & Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances, 69 Calif. L. Rev. 317, 358 n.199 (1981).

Circuit below[9] and in other cases[10] has recognized the limiting application of the statute authoritatively mandated by Cooper. The Court also has noted the change in Florida law with regard to removing restrictions on mitigating factors in 1978 after Lockett.[11] The Florida Supreme Court on occasion has also noted the susceptibility of its statute to an unconstitutional

9 The en banc majority acknowledged that "there was some ambiguity [in the Florida capital statute] as to whether a defendant had a right to introduce evidence in mitigation at a capital sentencing proceeding when the evidence fell outside the mitigating factors enumerated by the statute." 770 F.2d at 1516; App. 3a. The "confusion in Florida law surrounding nonstatutory mitigating evidence" was "finally alleviated" after Lockett. Id. However, in view of the clarity of the Cooper opinion in enforcing a "mandatory limitation" on mitigating evidence, it could be questioned whether Florida law could be characterized as containing merely "some ambiguity" or "confusion."

10 See, e.g., Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc) (state trial judge had interpreted the Florida statute as limiting the consideration of mitigating factors to the statutory circumstances); id. at 1495 (Clark, J., concurring and dissenting) ("Florida law, as reasonably and logically construed by both [counsel and the trial court], operated to preclude non-statutory mitigating evidence"); Proffitt v. Wainwright, 685 F.2d 1227, 1238 n.19 (11th Cir. 1982) (finding that Cooper held that mitigating factors were limited exclusively to the statute); Ford v. Strickland, 696 F.2d 804, 812 (11th Cir. 1983) (en banc) (Lockett was a "direct reversal" of the Cooper holding that mitigating factors were limited to the statute); Foster v. Strickland, 707 F.2d 1339, 1346 (11th Cir. 1983) (in Cooper "the Florida Supreme Court ruled explicitly that the jury could consider only statutory mitigating circumstances").

11 See Spaziano v. Florida, ___U.S.___, 104 S.Ct. 3154, 3158 n.4 (1984) (recognizing the change in Florida law that occurred in 1978 from consideration of only "statutory mitigating circumstances" to "any mitigating circumstances"); Barclay v. Florida, 463 U.S. 939, 961 n.2 (1983) (same). See also Songer v. Wainwright, ___U.S.___, 105 S.Ct. 817 (1985) (order denying certiorari, Marshall, J., dissenting) (surveying the history of Florida law regarding the limitation on mitigating circumstances). As the Court noted, Florida amended its statute after Lockett to remove the "as enumerated" language from the subsections setting out the procedure to be followed by the jury and the judge for determining the appropriate sentence. See §§ 921.141(2),(3), Fla. Stat. (1979); App. 36a.

application before Lockett.[12] While the Florida court's pre-Lockett application of its statute may be understandable, see Lockett, 438 U.S. at 602, that restrictive application by the state's highest court nevertheless carried with it the potential of significant constitutional harm for capital cases tried during that time.

Mr. Hitchcock's trial occurred after Cooper but before Lockett. He was tried therefore during the period in Florida law when the Florida capital sentencing statute was most authoritatively and clearly being applied in a manner that "harsh[ly]" enforced its "mandatory limitation" on the consideration of mitigating factors. The record in this case demonstrates that limitation. An affidavit by trial counsel was proffered in the district court (appended to a motion for evidentiary hearing) in which counsel states unequivocally that he was operating at Mr. Hitchcock's trial under the belief that mitigation was limited by the statute to the enumerated mitigating factors.[13] The record further reveals that not only Mr. Hitchcock's lawyer believed that consideration of mitigation was strictly limited to the statute, but so did the prosecutor and the judge. In arguing the weighing process of the Florida capital sentencing scheme,

12 In Harvard v. State, ___ So.2d ___, 11 F.L.W. 55 (Fla. 1986) the court found that "our death penalty statute could have been reasonably understood to preclude the introduction of nonstatutory mitigating evidence." Id. at 56. The court also said that counsel could not be ineffective for failing to present nonstatutory mitigating evidence, "given the state of the law at the time" of Harvard's trial. Id. See also Muhammad v. State, 426 So.2d 533, 538 (Fla. 1983); Perry v. State, 395 So.2d 170, 174 (Fla. 1981) (trial judge, citing Cooper, believed that the Florida statute precluded consideration of nonstatutory mitigating factors); Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981) (same). On direct appeal in this case the court said "it appears that the defense itself chose to limit that presentation [of mitigating factors]." 413 So.2d at 748. However, in post-conviction relief where the reason for that defense limitation was shown, it said that the "claim boils down to merely another Lockett challenge. 432 So.2d at 43 n.2.

13 The court of appeals' majority criticized counsel's affidavit for not also explicitly stating that he would have presented a different kind of defense. But, as will be shown in Part II infra, such criticism was both premature and legally inapposite to the Lockett claim as presented by this case.

counsel referred only to the "several different aggravating circumstances and several different mitigating circumstances that the judge is going to tell you that you are to consider in rendering an advisory verdict." TAS 17 (emphasis supplied). And, of course, the judge instructed only on the statutory mitigating factors: "The mitigating circumstances which you may consider shall be the following: [statutory list]." TAS 56.

The prosecutor's argument likewise is revealing of his belief in the limitation on mitigating circumstances. He told the jury that the judge would instruct it on the "seven mitigating circumstances" and that "after you have considered all the aggravating circumstances, then you are to consider the mitigating circumstances and consider them by number." TAS 27-28 (emphasis supplied). See also TAS 43-44 (prosecutor telling the jury to use "mathematics" to sum up the statutory aggravating and mitigating factors to determine the appropriate sentence). The judge's sentencing order likewise restricted the capital sentencing determination to consideration of only statutory mitigating factors: "this Court finds that sufficient aggravating circumstances exist as enumerated in Fla. Stat. 921.141(5) to require imposition of the death penalty, and there are insufficient mitigating circumstances, as enumerated in Fla. Stat. 921.141(6), to outweigh the aggravating circumstances." TR 192 (emphasis supplied).[14] It is quite evident from the record that all parties believed that the statute limited mitigation strictly to the statute -- a belief consistent with the "mandatory limitation" authoritatively set forth by the State's highest court in Cooper.

[14] Unlike the situation in Songer v. Wainwright, supra, and Harvard v. State, supra, where the original sentencing judges heard the state post-conviction motions and during those proceedings stated that they had also believed the statute limited consideration of mitigating factors, the original sentencing judge in Mr. Hitchcock's case did not hear his post-conviction motion. Thus, unlike Songer and Harvard, Mr. Hitchcock was denied the opportunity for a finding only the original judge could make: that the judge also limited his consideration to the statutory mitigating factors. Nowhere does the record show, however, that the judge applied anything but the "mandatory limitation" set down by Cooper.

Though counsel had been able to present some brief character evidence in the guilt/innocence trial to show that James Hitchcock's brother, Richard, was more likely to have committed the offense and why James would have tried to cover up and accept the blame for him, his presentation in the penalty trial was limited to an attempt to establish a statutory mitigating circumstance. Counsel presented another brotner's testimony that their father died when James was young and that James had "sucked on gas" and passed out once when he was five or six years old which "affected" his mind. From this evidence, counsel attempted to show the basis for the statutory mitigating circumstance relating to mental condition. § 921.141(6)(b), Fla. Stat. (1975). Counsel refrained from arguing to the jury even the barebones character evidence that had made it into the record, as being independent mitigating reasons calling for a sentence less than death. Rather, counsel simply alluded briefly to some of the evidence, offering it "for whatever purposes you [tne jury] deem appropriate." TAS 14. Counsel, after this brief, restrained and enigmatic comment, then stuck strictly to the meager statutory mitigating factors in arguing against tne imposition of death. TAS 21-25.[15]

Tne record in this case also includes the significant nonstatutory mitigating evidence that was available and could have been presented had counsel not been operating under the application of the statute that limited mitigation to the statute. This evidence was proffered in Mr. Hitchcock's habeas corpus petition and as briefly shown in Part II, infra, included the substance of Mr. Hitchcock's family and social history and expert psychological analysis. Tnat the restrictive application of the statute could nave made a difference -- that this was at

[15] The en banc majority quoted another part of counsel's closing argument -- telling the jury to consider tne "whole ball of wax" -- but as shown in footnote 22, infra at pg. 22, that argument did not refer to nonstatutory mitigating evidence as the court below implies by its quotation.

best a close case for the death sentence -- is also illustrated from the record by the life sentence offered to Mr. Hitchcock by the court and prosecutor prior to trial. See Part III, infra.

Thus, the record reveals that the narrowly restrictive application of the statute actually infected this particular capital sentencing trial in a manner that denied the Eighth Amendment requirement of individualized consideration, so as to "create[] the risk that the death penalty [was] imposed in spite of factors which call for a less severe penalty." Lockett, 438 U.S. at 606. As a result, Mr. Hitchcock was sentenced with the same disregard for individuating circumstances as were Monty Lee Eddings[16] and Sandra Lockett. The Eighth Amendment was violated by that result.[17]

This case is especially appropriate for review by the Court of this substantial constitutional question, since it is before the Court solely as a matter of law, not of fact. No evidentiary hearing has been held in either the state or federal courts. The record of this case nevertheless presents the legal claim upon a substantial factual basis, for it demonstrates the limitation on mitigating factors as directly engendered by the

16 Eddings v. Oklahoma, 455 U.S. 104 (1982).

17 The Sixth Amendment right to the effective assistance of counsel is also implicated by this application of the statute either because the statute by reasonably restricting counsel's ability to properly represent his client by presenting individualized mitigating evidence would be "state interference with counsel's assistance," Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 2067 (1984); cf. Herring v. New York, 422 U.S. 853, 857 (1975), or because counsel was unreasonable in relying upon the limiting application of the statute and thus failed "to make the adversarial testing process work in [this] case." Strickland, 104 S.Ct. at 2066. Both the Eleventh Circuit and the Florida Supreme Court have ruled, however, that Florida defense lawyers were not ineffective in failing to present nonstatutory mitigating evidence because Florida law at the time restricted the consideration of mitigating factors. See, e.g., Harvard v. State, ___ So.2d ___, 11 F.L.W. 55, 56 (1986) (counsel was not ineffective "given the state of the law at the time" which limited mitigation to the statute); Muhammad v. State, 426 So.2d 533 (Fla. 1983) (trial counsel could not be "expected to predict the decision in Lockett"); Proffitt v. Wainwright, 685 F.2d 1227, 1238 (11th Cir. 1982) (same). Thus, if counsel reasonably provided representation that failed to meet the Eighth Amendment requirements of individualized consideration due to the application of the statute, then the statute itself was flawed in its application.

pre-Lockett Florida law. Further, the issue has been litigated and decided on the merits throughout the lower courts. The issue is thus ripe for review and fully presented by this case.

Only the Court can clarify the confusion that presently exists in the law. Such an urgent (and notorious) constitutional question should finally be settled to permit this and other affected cases to be uniformly resolved, lest it continue that "one person [goes] to the gallows when nonstatutory mitigating circumstances were not considered, while others may not be going because those circumstances were considered." Jackson v. State, 438 So.2d at 7 (McDonald, J., dissenting). Only the Court can prevent this tragic course.

II.

IN DENYING RELIEF ON PETITIONER'S LOCKETT CLAIM, THE COURT OF APPEALS MISCONSTRUED THE RULE OF LOCKETT AND ERRED IN HOLDING THAT PETITIONER'S CLAIM, AS PLED, DID NOT REQUIRE AN EVIDENTIARY HEARING

The court of appeals' failure to remand Mr. Hitchcock's Lockett claim for an evidentiary hearing reflects a fundamental misunderstanding of the rule of Lockett and the necessity of an evidentiary hearing to resolve the kind of claim asserted by Mr. Hitchcock. As we set out in greater detail below, the court of appeals held that a Lockett error could occur under the circumstances presented by Mr. Hitchcock only if counsel would have presented a different kind of evidence had he not been constrained by the death penalty statute. Lockett, however, is not so limited, for it is as much concerned with the sentencer's inability to consider the facts of record as independent mitigating factors as with the sentencer's being entirely precluded from considering certain kinds of facts as mitigating factors.

Due to its misapprehension of Lockett, the court of appeals held that the record in Mr. Hitchcock's case demonstrated that Mr Hitchcock was not entitled to relief and thus affirmed the

summary dismissal of the Lockett claim under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. Had Rule 4 been applied to Mr. Hitchcock's claim as raised, however -- rather than as misconstrued by the court of appeals' improperly narrow construction of Lockett -- Rule 4 would not have permitted summary dismissal. Further, even if a Rule 4 dismissal might have been appropriate in light of Mr. Hitchcock's pleading and the proffered affidavit of trial counsel, Mr. Hitchcock's pleading and proffer were inadequate only in light of the court of appeals' newly-articulated standards -- first announced in Mr. Hitchcock's case -- for the pleading of his Lockett claim. Under the well-established principles of Blackledge v. Allison, 431 U.S. 63 (1977), therefore, at the very least Mr. Hitchcock should have been provided the opportunity to satisfy those newly-announced pleading requirements.

A. The Court of Appeals Erroneously Narrowed the Rule of Lockett in Holding that Mr. Hitchcock Had Failed to Demonstrate a Lockett Violation

In denying relief on Mr. Hitchcock's Lockett claim, the court of appeals held that

> the record belies the argument that at the time of the case, the presentation to the jury (by defense counsel) would have been appreciably different had it not been for the possible confusion of petitioner's attorney as to the law on mitigating circumstances.

770 F.2d at 1517; App. 4a. Discussing counsel's "presentation to the jury," the court of appeals quite clearly understood that Lockett would have been violated under the circumstances presented by Mr. Hitchcock only if Hitchcock could show that counsel would have presented a different kind of evidence had he not been constrained by the death penalty statute. See 770 F.2d at 1517-18; App. 4a-5a (comparing the kind of evidence actually

presented with the kind of evidence that could have been presented had counsel not been constrained, and concluding that the kind of evidence that could have been presented "was developed ... to some extent for the jury"). This construction of Lockett reflects a fundamental misunderstanding of Lockett by the court of appeals' majority, for the holding of Lockett was not nearly this narrow.

In Lockett the presentence report had presented a number of nonstatutory mitigating factors to the sentencer: Sandra Lockett had a favorable prognosis for rehabilitation if returned to society, had committed no major prior offenses, was relatively young (21 years old), had no specific intent to cause the death of the victim of the crime, and played a relatively minor role in the crime. 438 U.S. at 594-597. While all of these factors could be considered by the sentencer, id. at 607-08, they "would generally not be permitted, as such, to affect the sentencing decision," id. at 608 (emphasis supplied), unless they "shed[] some light on one of the three statutory mitigating factors." Id.[18] It was this aspect of the Ohio statute -- that precluded the sentencer from considering the nonstatutory mitigating factors in Sandra Lockett's case as "independently mitigating factor[s]" -- that violated the Eighth Amendment. Id. at 607.

In subsequent cases, the Court has made clear that the preclusion of any consideration at all of nonstatutory mitigating factors is just as violative of the Eighth Amendment as the

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[18] The three statutory mitigating factors were as follows:

> (1) The victim of the offense induced or facilitated it.
>
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

438 U.S. at 607.

extremely limited consideration of nonstatutory mitigating factors that was condemned in Lockett. See Green v. Georgia, 442 U.S. 95 (1979) (exclusion of evidence that a person other than the defendant actually killed the victim of the homicide); Eddings v. Oklahoma, 445 U.S. 104 (1982) (exclusion from the sentencer's consideration of evidence of defendant's family history). In so holding, however, the Court has not receded from its holding in Lockett that the Eighth Amendment is violated by a statute which, though permitting general consideration of nonstatutory mitigating factors, does not permit the consideration of nonstatutory mitigating factors, "as such, to affect the sentencing decision." 438 U.S. at 608.

When these principles are applied to the Lockett claim by Mr. Hitchcock, it is clear that the claim can be made out in either of two ways. First, if the statute's constraint upon counsel prevents counsel from presenting a certain kind of evidence at all because it is a nonstatutory mitigating factor, the Eighth Amendment is violated as it was in Green and Eddings. Through this process, relevant evidence is entirely excluded from the sentencer's consideration. Thus, in the terms used by the court of appeals, if Mr. Hitchcock had shown that counsel's misunderstanding of the statute had prevented him entirely from presenting a certain category of nonstatutory mitigating evidence, the Lockett claim would have been adequately stated. However, the court of appeals erred in holding that this was the only way in which Mr. Hitchcock could state his claim.

Alternatively, if Mr. Hitchcock demonstrated that the statute's constraint upon counsel obliged him to make nonstatutory mitigating points indirectly, by shoehorning them into the mold of statutory mitigating circumstances instead of arguing that the nonstatutory mitigating factors independently called for a life sentence, he would have stated an Eighth Amendment claim precisely as it was stated in Lockett. Through this process, the sentencer would have been precluded from considering relevant

nonstatutory mitigating evidence, just as in Lockett, "as an independently mitigating factor." 438 U.S. at 607. Accordingly, even if Mr. Hitchcock did not claim that counsel would have presented a different kind of evidence but for the constraint of the statute, he nevertheless could adequately state a claim under Lockett if he claimed that counsel would have made a fuller, more focused, and more forceful presentation in mitigation if the unconstitutional rule of state law had not been in effect.

There can be no legitimate question that Mr. Hitchcock at least stated this kind of violation of the Eighth Amendment. Although, as the court of appeals noted, defense counsel's penalty trial argument "referred to much of the evidence not fitting squarely within the confines of the statutory mitigating circumstances including the difficult circumstances of petitioner's upbringing, the possibility of rehabilitation, and that petitioner turned himself in," 770 F.2d at 1518; App. 5a, he did not argue that this evidence was sufficient, as such, to affect the sentencing decision. He argued only that the jury should consider this evidence "for whatever purposes you deem appropriate," TAS 14, and then argued that some of this evidence helped establish statutory mitigating factors. TAS 21-25. Just as in Lockett, the Florida death penalty statute prevented counsel from presenting the nonstatutory mitigating evidence "as an independently mitigating factor," 438 U.S. at 607.[19]

Accordingly, the court of appeals erroneously narrowed the rule of Lockett when it held that Mr. Hitchcock had failed to demonstrate a Lockett violation.

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19 By analogy to the cases in which defense counsel represents conflicting interests, Mr. Hitchcock has thus demonstrated that the Lockett-violative application of the Florida statute "adversely affected [the defense] lawyer's performance," Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Mr. Hitchcock does not contend that every capital case tried in Florida before Lockett must be reversed. It is only in those cases where the Lockett-violative application of the statute can be shown to have "adversely affected" the presentation and thus, consideration, of mitigating factors that constitutional relief must be granted. Where such a showing is made, it is "the manner of the imposition of the ultimate penalty," Eddings, 445 U.S. at 116, that is constitutionally flawed. Such a flawed procedure is the concern of the Eighth Amendment, for it is that procedure that creates the risk of erroneous imposition of the death sentence.

B. **The Court of Appeals Erred in Holding that a Plausible and Well-Pleaded Claim that Significant Nonstatutory Mitigating Evidence Was Neither Proffered as Independently Mitigating Nor Fully Presented Because of the State's Unconstitutional Rule of Law, May Be Rejected Without an Evidentiary Hearing**

As noted, the court of appeals held that a Lockett error could occur under the circumstances presented by Mr. Hitchcock only if counsel would have presented a different kind of evidence had he not been constrained by Florida's unconstitutional application of its death penalty statute. Having framed Mr. Hitchcock's claim in this fashion, the court affirmed the dismissal of the claim under Rule 4 of the habeas rules since "the record belies the argument" that counsel would have presented a different kind of evidence but for the state's unconstitutional rule of law. 770 F.2d at 1517; App. 4a. While this might have been a valid ground of decision had the Lockett claim been appropriately framed only in this fashion, the Lockett claim was not so limited. Unquestionably, when framed faithfully against the contours of Lockett, Mr. Hitchcock's claim could not have been properly dismissed under Rule 4.

Under the standards plainly set forth by the Court in Blackledge v. Allison, 431 U.S. 63 (1977), a dismissal under Rule 4 is permissible only if: (1) the allegations in the petition are "in themselves so 'vague [or] conclusory' ... as to warrant dismissal for that reason alone," id. at 76; (2) "'the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief,'" id. at 74 n.4 (quoting 28 U.S.C. § 2225) (emphasis supplied); or (3) the allegations in the petition are "so 'patently false or frivolous' as to warrant summary dismissal," id. at 78. When properly framed in light of Lockett, Mr. Hitchcock's claim could not have been dismissed under these standards.

Rather than claiming, as the court of appeals held he must, that the constraint of the Florida death penalty statute prevented counsel altogether from presenting a certain kind of

mitigating evidence, Mr. Hitchcock claimed that the Florida statute severely curtailed counsel's development and presentation of mitigating evidence and obliged counsel to shoehorn the limited evidence he did present into the mold of statutory mitigating circumstances. Thus, while counsel did present isolated fragments of what the court of appeals characterized as "the difficult circumstances of petitioner's upbringing," 770 F.2d at 1518; App. 5a, these fragments did not reveal the most powerful influence in Mr. Hitchcock's life -- his "upbringing in an environment of poverty" -- as the court of appeals mistakenly said they did, id., nor did they reveal the uniquely tragic consequences of the death of Mr. Hitchcock's father when he was a young child.[20] Further, Mr. Hitchcock's counsel did not argue that even this severely limited showing of "difficult circumstances" independently warranted a life sentence, but presented it only "for whatever purposes you may deem appropriate," TAS 14. See TAS 13-15. Similarly, while counsel did present, as the Court of appeals observed, some of Mr. Hitchcock's positive character traits which vaguely suggested the prospect of rehabilitation these traits did not begin to paint a full picture of a person who deserved to be spared from execution because of who he

20 The evidence of "difficult circumstances" that was presented was summarized by counsel as follows: Mr. Hitchcock grew up in a family of seven children supported by his parents picking and hoeing cotton; his father died when he was six or seven years old; and he left home at the age of thirteen in part because he did not get along with his stepfather. TAS 14-15. As alleged in the habeas petition, however, this evidence could, if fully developed, have shown that Mr. Hitchcock's family were tenant farmers living at a bare subsistence level, with food in scarce supply, with flour sack clothing and no indoor plumbing, and with the children working along with their parents in order to survive. Further, the evidence could have shown the deep, life-changing upheaval suffered by Mr. Hitchcock as a result of his father's death -- that he struggled to rebound from the loss more than did the others, that the loss of the father triggered a breakdown of the family since the father had kept the family together and maintained the love relationships within that family, and that when his father was taken from him, Mr. Hitchcock lost his sense of belonging, of family, and of roots.

was.[21] Further, counsel did not argue that these character traits were independently mitigating, TAS 15-17, but tried to snoehorn them into the statutory mitigating circumstance of age and youth. See TAS 23-24 ("there is a chance for this man, who is still young, who is capable [,] to eventually lead a good life").

When analyzed in the way that Mr. Hitchcock presented his claim -- and in a way that accurately reflects the principles of Lockett -- rather than in light of the court of appeals' fundamental misconstruction of the claim and of Lockett, this claim unquestionably survives a Rule 4 review. Rather than "bel[ying]" the claim, as the court of appeals held, the record supports the claim. The trial court record affirmatively and unequivocally shows that trial counsel acted under the unconstitutional constraints of the Florida death penalty statute, unable to argue the nonstatutory mitigating evidence as independently mitigating and obliged to force this evidence into the mold of statutory mitigating circumstances.[22] Moreover, the allegations of the habeas petition show what the trial record points to: that counsel felt constrained to argue to the jury that only the statutory mitigating circumstances could be considered, as such, in determining the sentence, and that, in the absence of such constraint, counsel not only could have argued that the nonstatutory mitigating evidence itself could support a life sentence, but also could have presented much more fully developed and persuasive evidence of the nonstatutory mitigating factors that were tentatively and fragmentarily adduced at the trial. These allegations unequivocally demonstrate "reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is [sentenced to death] illegally and is therefore entitled to relief ...." Harris v. Nelson, 394 U.S. 286, 300 (1969). Upon such allegations, a Rule 4 dismissal is improper, for "it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." Id.

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21 Despite the court of appeals' statement that Mr. Hitchcock's "solid character traits, devotion to hard work, [and] willingness to contribute to the family's support" were "[a]ll ... developed ... to some extent for the jury," 770 F.2d at 1518; App. 5a, the record clearly reveals otherwise. With respect to the qualities of Mr. Hitchcock's character, counsel presented -- again only in a minute way -- evidence of Mr. Hitchcock's nonviolent character, obedience as a child, and honesty. See TAS 15-17. As alleged in the habeas petition, many additional positive traits of character could have been shown, including Mr. Hitchcock's devotion to hard work, generosity, genuine concern for others, and willingness to sacrifice himself for his family and for others. Moreover, direct evidence of his good prospects for rehabilitation could have been presented instead of the mere inferences that were argued by counsel. A psychologist experienced in evaluating persons in prison could have presented these findings as follows:

> James does not, in many respects, fit the more typical picture of those who commit violent acts against other individuals.... He does not evidence the same degree of immaturity, of strong drives toward immediate gratification, of impulsive acting out of emotions, or of hostility and aggression.... If James' sentence were commuted and he were to be in 'population,' there is every reason to believe that not only would he function well but he would be a positive influence.... [H]e is bright, articulate, capable of insight....

(Emphasis supplied.)

22 The court of appeals' opinion, in one respect, suggests that the record does contradict Mr. Hitchcock's claim even when that claim is accurately framed. The court of appeals suggests that counsel did argue that the nonstatutory mitigating evidence could be used independently to suport a life sentence when counsel argued to the jury to

> look at the overall picture. You are to consider every thing together ... consider the whole picture, the whole ball of wax.

770 F.2d at 1518; App. 5a. This suggestion is misleading, however. An examination of the transcript where that quoted argument appears, TAS 49-52, reveals plainly that it was an effort to rebut the prosecutor's argument that the jury should use "mathematics" to compute the verdict by summing the number of statutory aggravating and mitigating factors, TAS 43-44. Defense counsel did not refer to any nonstatutory mitigating factors in the argument, but rather was merely trying to describe the weighing process of the Florida capital sentencing scheme. The en banc majority's quotation of that argument is thus so out of context that it is extremely misleading. It does not contradict Mr. Hitchcock's claim.

C. **The Court of Appeals Further Erred by Retroactively Applying a Novel Procedural Rule to Deny an Evidentiary Hearing**

The court of appeals placed determinative emphasis upon the detail of the "post-trial affidavit[]... of trial counsel." In support of its holding that "the record belies the argument that at the time of the case, the presentation to the jury would have been appreciably different," the majority below parsed trial counsel's affidavit, finding that it "does not indicate ... that [counsel] would have done anything differently at that time" had he not believed that he was constrained by the statute. 770 F.2d at 1517; App. 4a. Based upon this finding, the court of appeals denied Mr. Hitchcock an evidentiary hearing. Apart from the misperception of Lockett discussed above and accepting the narrow claim framed by the court of appeals, it was independent error to adjudicate the Lockett claim by applying procedures first explicted in the Hitchcock opinion without providing Mr. Hitchcock a fair opportunity to meet this new procedural rule.

At the time of making that affidavit no standards had been announced for such affidavits nor had there ever been any indication that an affidavit was needed or that it would be relied upon to the exclusion of the allegations set forth in the petition itself. The affidavit in this case was submitted simply as a proffer in the appendix to petitioner's motion for evidentiary hearing only to show that there was evidence that required development at an evidentiary hearing as required by Blackledge v. Allison, 431 U.S. 63 (1977). Despite the novelty of the court of appeals' procedural rule, it did not provide Mr. Hitchcock the opportunity to present supplemental affidavits.

As the Court taught in Blackledge, a habeas litigant "should not be required to prove his allegations in advance of an evidentiary hearing, at least in the absence of counter affidavits conclusively proving their falsity." Id. at 70. Moreover,

such a burden even if appropriate should not be adopted retroactively. Thus, in Blackledge the magistrate's direction to the petitioner to obtain affidavits to support his claim

> imposed upon Allison a novel and formless burden of supplying proof ... without any intimation that dismissal would follow if that burden were not met. It thus can hardly be said that Allison was granted a "full opportunity for presentation of relevant facts."

Id. at 83 n.6 (emphasis supplied). Yet the court of appeals has done just what Blackledge decried. It adjudicated Mr. Hitchcock's Lockett claim by applying procedures first explicated in the en banc Hitchcock opinion to an affidavit made before these procedures were explicated, and before it was known that affidavits of trial counsel would be used as the basis for adjudicating such claims in the way that the en banc Hitchcock opinion used them. Mr. Hitchcock should not be bound to a record made before the requirements for affidavits of this kind had been clarified by the Court.[23]

Moreover, had Mr. Hitchcock been provided the opportunity to meet that new rule, he could have done so. On rehearing from the en banc opinion, Mr. Hitchcock expressly sought the opportunity to submit supplemental affidavits to address the novel procedural rule of that opinion. In support of this request he proffered exemplary affidavits -- from the attorneys who had taken trial counsel's initial affidavit and an additional affidavit by trial counsel.

The affidavits of the attorneys who drafted and secured the original affidavit from trial counsel state that they "did not ask counsel to address [the] question in the affidavit" of

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23 Cf. Smith v. Yeager, 393 U.S. 122 (1968) (habeas petitioner who litigated petition prior to announcement of standards for granting evidentiary hearing not barred from litigating a second petition on the same grounds but under the subsequently explicated standards). If an administrative agency employed a similar procedure for adjudicating a party's rights on the basis of a record made by attorneys who were justifiably without "awareness of the ... argument to be countered," Gonzales v. United States, 348 U.S. 407, 415 (1955), no court would hesitate to find that due process of law had not been afforded to that party. See, e.g., Morgan v. United States, 304 U.S. 1 (1938); Willner v. Committee on Character and Fitness, 373 U.S. 96, 104-105 (1963). The same would be true if a state appellate court employed such a procedure. See Cole v. Arkansas, 333 U.S. 196 (1948); Presnell v. Georgia, 439 U.S. 14 (1978).

whether he "would have acted differently if he had not been under the misimpression that consideration of mitigating factors was limited to those enumerated in the Florida statute." They did not do so because "[a]t the time of the taking of the affidavit ... [they] did not conceive that the affidavit would be used as the basis for adjudicating [the] claim on the merits." They intended the affidavit "only to satisfy the Blackedge v. Allison ... requirement of demonstrating that there was evidence that required development at an evidentiary hearing."

Moreover, the supplemental affidavit by trial counsel confirms that he was not asked to address in his original affidavit whether "he would have done anything differently at that time." Counsel further confirms that he was acting under the belief that consideration of mitigating circumstances was limited to those set out in the statute and that his belief did affect the way in which he presented the penalty phase defense of Mr. Hitchcock. For example,

> I would have argued to the jury that Mr. Hitchcock's family history and childhood background were independent mitigating factors concerning "other aspects of the defendant's character or record, and any other circumstances of the offense."

Further, with regard to evidence of childhood background and potential for rehabilitation, counsel stated that he, "would have presented such evidence, had that evidence been available to me and had I known the legal right to do so."

Thus, the court of appeals' retroactive application of its novel procedural rule was improper and hence insufficient to avoid the significant constitutional issue that is presented by this case.

III.

THE IMPOSITION OF A DEATH SENTENCE BY THE COURT AFTER IT HAD OFFERED MR. HITCHCOCK A LIFE SENTENCE, WITHOUT AN AFFIRMATIVE SHOWING ON THE RECORD TO JUSTIFY THE "QUALITATIVELY" ENHANCED PENALTY IMPOSED AFTER MR. HITCHCOCK EXERCISED HIS FUNDAMENTAL RIGHT TO TRIAL BY JURY, VIOLATES THE DUE PROCESS CLAUSE AND EIGHTH AMENDMENT GUARANTEES OF FAIRNESS AND RELIABILITY

Before Mr. Hitchcock exercised his right to trial by jury, the prosecutor and the trial judge decided that only a life sentence was necessary in this case. There was no need to put Mr. Hitchcock to death. This is shown by the offer to Mr. Hitchcock by the prosecutor and the judge that if Mr. Hitchcock would plead nolo contendere to the charge, he would be sentenced to life imprisonment -- his life would be spared. Mr. Hitchcock declined the offer and chose instead to exercise his right to trial by jury. After that trial, the judge imposed a sentence of death, without stating or making the record affirmatively show his reasons for imposing this "qualitatively" enhanced sentence after the exercise of a fundamental right.[24]

The question in this case involves the constitutional propriety of such a process of selecting Mr. Hitchcock as one of the few who must die from the many who will not. It is a question of fairness and the appearance of fairness under the Due Process Clause, and of rationality and reliability as demanded by the Eighth Amendment. The reasons that the situation in this case does not represent the usual breakdown in negotiations that occurs daily in the criminal courts are twofold. First, it is the court that was involved in the life-sentence offer and not merely a prosecutor acting within an adversary system. This fact brings to bear the due process standards of North Carolina v. Pearce, 395 U.S. 711 (1969). Second, the death penalty is involved in this case. This fact incorporates the uniquely coercive nature of the death sentence explained by the Court in

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24 These facts are as alleged by Mr. Hitchcock below. Both the district court and the en banc majority treated this question as a matter of law and therefore accepted petitioner's facts as true, i.e., that the judge would have sentenced Mr. Hitchcock to life had he entered a plea to the charge. 770 F.2d at 1518. App. 5a.

United States v. Jackson, 390 U.S. 570 (1968), and the Eighth Amendment mandates of heightened reliability and of rationality and the appearance of rationality as articulated in Gardner v. Florida, 430 U.S. 349 (1977) as well as other decisions.

North Carolina v. Pearce, supra, involved the imposition of a greater penalty on the defendant upon retrial after he had exercised his right to appeal his conviction. The Court found no absolute double jeopardy bar to a greater penalty, but did find that the Due Process Clause imposed certain restrictions:

> Whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id. at 726 (emphasis supplied). The rule of Pearce, therefore, is that imposition of a harsher punishment after the exercise of a legal right must be supported by an affirmative showing of the judge justifying the harsher penalty. Due process requires such an affirmative showing in order to preclude a penalty being exacted and the appearance or "apprehension" of such a penalty for the exercise of a fundamental right which would deter the defendant's exercise of that right. Id. at 725. It is the court's imposition of an enhanced penalty after the exercise of a right that triggers the due process requirements.

The closely-divided en banc court based its rejection of Mr. Hitchcock's due process claim on its reasoning that as a matter of law Pearce "does not apply to the failure of a plea bargain." 770 F.2d at 1518; App. 5a. The majority held that "[i]n the 'give-and-take' of plea bargaining, the state may extend leniency to a defendant who pleads guilty foregoing his right to a jury trial." Id. Such reasoning is too facile, however, for it fails to acknowledge the need to examine the particular situation under the objectives of Pearce in order to determine the applicability of the Pearce standards. In particular the en banc majority

failed to account for the qualitative difference of the death penalty -- while it may be permissible to offer a defendant a reduced prison term for giving up his right to a trial, it is not permissible to offer him his very life for doing so. Just as significantly, the court of appeals also failed to consider that this case concerns involvement of the court, not simply the prosecution in the "give-and-take of plea bargaining." These factors are critical in determining the applicability of Pearce.

Most recently, in Texas v. McCullough, ___ U.S. ___, 106 S.Ct. 976 (1986), the Court explained the considerations to be followed in determining whether the Pearce presumption is applied to a particular situation. The Court iterated that "Pearce [is applied] to areas where its 'objectives are thought most efficaciously served.'" 106 S.Ct. at 979 (quoting Stone v. Powell, 428 U.S. 465, 487 (1976)). Thus, the Court explained, "in each case, we look to the need under the circumstances, to 'guard against vindictiveness in the sentencing process.'" 106 S.Ct. at 979 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 25 (1973)). The Pearce presumption applies where there is a "justifiable concern about 'institutional interests that might occasion higher sentences by a judge desirous of discouraging appeals.'" 106 S.Ct. at 979 (quoting Chaffin, 412 U.S. at 27). Thus, situations where there is a "realistic motive for vindictive sentencing" or an "apprehension of retaliatory motivation on the part of the sentencing judge,'" the Pearce presumption is appropriate. 106 S.Ct. at 980.[25]

The instant situation, where a defendant about to be put on trial for his life is offered his life by the court if he will forego his right to trial, presents the "justifiable concern,"

25 Therefore, although approving the increased sentence after the granting of a motion for new trial, the Court in McCullough emphasized that different sentencers were involved (at the defendant's request) and that the judge had specifically stated that the increased sentence was based upon new information not available during the first trial. Neither of these situations apply to Mr. Hitchcock's case.

"apprehension," and "realistic motive" that Pearce's prophylactic rule was intended to reach. And where a defendant receives a death sentence after exercising his right to trial, Pearce's requirement of an affirmative record showing of the reasons justifying an increased sentence is the only constitutional protection.

It is black letter law that the right to trial by jury is a fundamental right, Duncan v. Louisiana, 391 U.S. 145, 158 (1968), and that criminal defendants may not be penalized for the exercise of constitutional rights.[26] "The chilling effect of such a practice upon standing trial would be as real as the chilling effect upon taking an appeal that arises when a defendant appeals, is reconvicted on remand and receives a greater punishment."[27]

Thus, a court may not penalize a defendant for exercising his constitutional right to stand trial. The ninth circuit has accordingly held that therefore when the court has been involved in plea bargaining the record must affirmatively show that no weight was given to the refusal to plead guilty:

> [O]nce it appears in the record that the court has taken a hand in plea bargaining, that a tentative sentence has been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty. In such a case, the record must affirmatively show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty.

United States v. Stockwell, 472 F.2d 1186, 1187-88 (9th Cir. 1973). See also Hess v. United States, 496 F.2d 936, 938 (8th Cir. 1974).

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26 See United States v. Jackson, 390 U.S. at 581; Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort"). From these two principles follow the command that "the Constitution forbids the exaction of a penalty for a defendant's unsuccessful choice to stand trial." Smith v. Wainwright, 664 F.2d 1194, 1196 (11th Cir. 1981).

27 United States v. Stockwell, 472 F.2d 1186, 1187 (9th Cir. 1973). See also Hess v. United States, 496 F.2d 936 (8th Cir. 1974); United States v. Derrick, 519 F.2d 1 (6th Cir. 1975); Poteet v. Fauver, 517 F.2d 393 (2d Cir. 1975); Baker v. United States, 412 F.2d 1069 (5th Cir. 1969).

The key fact requiring the application of the Pearce standards to the situation in the present case is that it is the court that has offered the sentence before trial and increased that sentence after the exercise of the right to trial. This was the fact that caused Pearce to be decided the way that it was. The situation of the decisionmaker offering a sentence to a defendant before trial and then increasing it after trial is at the far pole from a prosecutor working within an adversary system seeking a higher charge or sentence after the breakdown of negotiations.

It is the court's involvement that differentiates this case from the situation in Bordenkircher v. Hayes, supra that was relied upon by the en banc majority. In that case the Court approved a process where the prosecutor filed an additional habitual felony charge against the defendant after the defendant declined the prosecutor's plea bargain. 434 U.S. at 358-59. The Court saw controlling significance in the fact that it was not the "State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right" that was involved -- "a situation 'very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power.'" Id. at 362 (quoting Parker v. North Carolina, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting)). Thus, at the base of Bordenkircher is the fact that the ultimate decisionmaker was not involved -- it was not a "unilateral" imposition of a penalty -- but rather only an "equal" negotiator.[28]

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28 That Bordenkircher rested upon this give-and-take of adversaries for its approval is further demonstrated by Justice Stewart's concurring opinion in Corbitt v. New Jersey, 439 U.S. 212 (1978). Justice Stewart, the author of Bordenkircher, filed a concurring opinion in Corbitt to emphasize that Bordenkircher had "involved plea negotiations between the attorney for the prosecution and the attorney for the defense in the context of an adversary system." 439 U.S. at 227 (Stewart, J., concurring). In Corbitt the Court approved a statutory scheme where a defendant who went to trial and was convicted of first degree murder received a mandatory life sentence, whereas one who entered and had accepted a plea of nolo contendere could receive a lesser sentence. Again, Corbitt did not involve the ultimate decisionmaker making an offer of a sentence and then increasing it after the exercise of a right.

Judge Wisdom's opinion in Brown v. Beto, 377 F.2d 950 (5th Cir. 1967) sets out the dangers inherent in a court's involvement in plea bargaining:

> "The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and if convicted, he faces a significantly longer sentence."

Id. at 957 n.4 (quoting United States ex rel. Elkonis v. Gilligan, 256 F.Supp. 244, 254 (S.D.N.Y. 1966)). There is thus a powerful difference between ordinary bargaining and bargaining in which the trial judge, the ultimate sentencer, is involved. The appearance of impropriety is a very real danger. In United States v. Adams, 634 F.2d 830 (5th Cir. 1981), the court found that a court's participation in plea bargaining "surely affects 'the fairness, integrity or public reputation of judicial proceedings.'" Id. at 836. Though Adams was decided under F.R.Crim.P. 11, id. at 836 n.3, its discussion of the dangers inherent in sentencing by a judge who has participated in unsuccessful plea negotiations points to at least a Pearce-like constitutional rule in capital cases. "[J]udicial participation in plea negotiations is likely to impair the trial court's impartiality." Id. at 840. See also United States v. Werker, 535 F.2d 198, 202 (2d Cir. 1976).

It is plain from this discussion that the situation presented by this case carries the same dangers that led the Court in Pearce to require that the judge affirmatively show the reasons for an increased sentence after the defendant's exercise of a fundamental right. The appearance of impropriety is enough to call for the Pearce requirements.

There is one other factor that influences the resolution of this issue in this case and further demands the application of Pearce's due process mandate. That overriding factor is that this case involves the imposition of the death sentence.

In considering issues regarding permissible plea bargaining practices, the Court has been especially careful to carve out a different rule for capital cases than for noncapital cases. See United States v. Jackson, 390 U.S. 570 (1968). In Corbitt v. New Jersey, 439 U.S. 212 (1978) the Court approved a practice of extending leniency in return for a guilty plea in noncapital cases but carefully distinguished capital cases because "the death penalty, which is 'unique in its severity and irrevocability,' ... is not involved here." (citation omitted) Id. at 217. The en banc court overlooked this express distinction in its reliance upon Corbitt to reject Mr. Hitchcock's claim.

Capital cases carry their own set of governing constitutional principles that distinguish them from noncapital cases, including the greater need for reliability, the need for specific and detailed channeling of discretion, and the need for individualized sentencing. The fundamental requirement that the "decision to impose the death sentence be, and appear to be, based upon reason," Gardner v. Florida, 430 U.S. at 358, is not met where a court determines before trial that a life sentence is appropriate, but after trial imposes the death sentence with no pretense of justification for increasing the penalty by such a qualitative leap.

Additionally, the unique power of the death penalty to coerce pleas and thus to chill and distort the right to trial was fully recognized by the Court in United States v. Jackson, supra, and Corbitt v. New Jersey, supra. In Jackson the Court held a statute unconstitutional because it made "the risk of death the price for asserting the right to jury trial, and thereby impairs ... free exercise of that constitutional right." 390 U.S. at 571. Because under the statute "assertion of the right to jury trial may cost him his life," id., the Court saw the issue before it as "whether the Constitution permits the establishment of such a

death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter the Sixth Amendment right to demand a jury trial." Id. at 581. "The question is not whether the chilling effect is incidental rather than intentional; the question is whether that effect is unnecessary and therefore excessive." Id. at 582. "[T]he evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers, but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of constitutional rights." Id. at 583.

Regardless of the propriety of the prosecutor penalizing a defendant for exercising his right to trial, no court until now has ever extended such reasoning to a court's offering of a lighter sentence before trial. And even if it were proper for a court to become involved in plea bargaining and extend a benefit to an accused for foregoing trial in noncapital cases, such a process has never before been approved by any court where the unique penalty of death is involved. Yet by its decision in this case, the court of appeals made both precedent-breaking rulings. Such leaps of law must be redressed by the Court, because the status of the law requires it and the dual concepts of rationality and fairness underlying the Eighth and Fourteenth Amendments demand it.

IV.

THE COURT OF APPEALS HAS INCONSISTENTLY RULED UPON THE SIGNIFICANT EIGHTH AND FOURTEENTH AMENDMENT QUESTION CONCERNING THE ARBITRARY AND DISCRIMINATORY APPLICATION OF THE DEATH PENALTY IN FLORIDA ON THE BASIS OF RACE AND OTHER IMPERMISSIBLE FACTORS

Mr. Hitchcock alleged in his petition for writ of habeas corpus that the death penalty in Florida is being administered in a discriminatory and arbitrary manner on the basis of race of the defendant and victim, geography, gender, and socio-economic status. In support of his claim, Mr. Hitchcock proffered all of

the then-available studies concerning the actual application of the death penalty in Florida and elsewhere,[29] and requested an evidentiary hearing, discovery and funds for expert assistance.

The district court summarily dismissed the claim under Rule 4, reasoning that under Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) a challenge to the application of a facially constitutional statute was foreclosed "as a matter of law." R 1192; App. 64a. The panel of the court of appeals likewise denied relief, relying upon citation to the opinions in the successive habeas proceedings in Sullivan v. Wainwright, 464 U.S. 109 (1983); and Wainwright v. Ford, ___ U.S. ___, 104 S.Ct. 3498 (1984). 745 F.2d 1342; App. 27a. The en banc court reinstated the panel opinion as to this claim. 770 F.2d 1516; App. 3a.

There is, however, confusion in the law as announced by the court of appeals. After the panel opinion in this case, the court of appeals announced its decision in McClesky v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc) in which it set forth new standards for evaluating claims of arbitrariness in the application of the death penalty. Thereafter, in a Florida case where the petitioner challenged the arbitrary application of the death penalty, based on the same studies upon which Mr. Hitchcock's claim is based the court of appeals ordered that because of the

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29 At the time of the filing of the federal habeas corpus petition, Mr. Hitchcock presented an unpublished study by William Bowers and Glenn Pierce that had been presented through their testimony in the case of Henry v. Wainwright before the same district court judge (appendix A in the district court) and a study by Dr. Linda Foley entitled Florida After the Furman Decision: Discrimination in the Processing of Capital Offense Cases (appendix B in the district court). During the pendency of the habeas petition in the district court, the manuscript draft of a new, far more comprehensive study became available and was furnished to the district court in July, 1983. That study is now published as Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan. L. Rev. 27 (Nov. 1964). Since the district court proceedings in Mr. Hitchcock's case, additional studies have been published: Radelet & Pierce, Race and Prosecutorial Discretion in Homicide Cases, 19 L. Soc'y. Rev. 587 (1985); Foley & Powell, The Discretion of Prosecutors, Judges, and Juries in Capital Cases, 7 Crim. Just. Rev. 16 (1982). See also Gross, Race and Death: The Judicial Evaluation of Discrimination in Capital Sentencing, 18 U.C.D. L. Rev. 1275 (1985); Baldus, Woodworth & Pulaski, Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia, 18 U.C.D. L. Rev. 1375 (1985).

intervening announcement of new standards in McClesky, the claim had to be remanded to the district court for reconsideration in the light of those standards. Griffin v. Wainwright, 760 F.2d 1505, 1518 (11th Cir.), reh. en banc den., 770 F.2d 1084 (11th Cir. 1985). Petitions for writ of certiorari are presently pending before the Court as to both of those intervening decisions. Wainwright v. Griffin, No. 85-801, pet. for cert. filed, October 16, 1985; McClesky v. Kemp, No. 84-6811; pet. for cert. filed, May 28, 1985. Those cases have set out in detail the factual and legal premises for the claim and thus petitioner will not burden the Court with further discussion.

Since the court of appeals has decided Mr. Hitchcock's claim in a manner directly contrary to its decision in Griffin v. Wainwright, and because the claim concerns a significant constitutional question as to the application of the death penalty, review by the Court is necessary for a fair and consistent resolution.

CONCLUSION

For these reasons, petitioner prays that the Court issue its Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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